No. 91-1200 (6)

In The

Supreme Court of the United States

October Term, 1991

THE CITY OF CINCINNATI,

Petitioner,

vs.

DISCOVERY NETWORK, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that Cincinnati's regulatory scheme prohibiting the placement of newsrack-type advertising dispensers upon city sidewalks burdens more speech than is necessary to achieve the City's admittedly substantial interests in the safety and esthetics of its public right-of-way.

2. Whether the Court of Appeals erred in holding that Cincinnati's regulatory scheme prohibiting the placement of newsrack-type advertising dispensers on its public rights-of-way, as applied to Discovery and Harmon is not a reasonable time, place and manner restriction.

LIST OF PARTIES

The petitioner, City of Cincinnati (hereinafter "Cincinnati") is a municipal corporation in the State of Ohio. Respondents, Discovery Network, Inc. (hereinafter "Discovery") and Harmon Publishing Company (hereinafter "Harmon") both conduct business in the Cincinnati, Ohio area.

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The opinion of the Sixth Circuit is printed in the appendix to petitioner's writ of certiorari at pages 1a-10a. It is also printed in the joint appendix at page 37 and is reported at 946 F.2d 464 (6th Cir. 1991). The findings of fact and conclusions of law of the United States District Court for the Southern District of Ohio is printed in the joint appendix at page 25.

JURISDICTION

Respondents Discovery and Harmon brought this action pursuant to 42 U.S.C. §1983 seeking declaratory and injunctive relief and alleging that petitioner Cincinnati's statutory scheme prohibiting the distribution of commercial handbills violated plaintiffs' First Amendment right to freedom of speech. (J.A. 3.) Respondents also alleged that the appeal process utilized by Cincinnati in enforcing its statutory scheme violated Fourteenth Amendment due process guarantees. (J.A. 3.) After a trial to the court, the due process claim was resolved in favor of Cincinnati. However, the First Amendment claim was resolved in favor of respondents. (J.A. 35.) Cincinnati filed a notice of appeal on September 10, 1990. (J.A. 36.) The opinion and judgment of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the trial court, were issued on October 11, 1991. (J.A. 37.)

The petition for writ of certiorari was filed on January 9, 1992 and the Court granted the petition on March 9, 1992.

STATUTES INVOLVED

This case involves 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343.

42 U.S.C. §1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

28 U.S.C. §1343 provides in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Also involved are Sections 714-1-C, 714-1-N, 714-23, 862-1, and 911-17 of the Cincinnati Municipal Code (hereinafter C.M.C.). The complete text of those sections along with the text of the Administrative Regulations, including Amended Regulation 38, which interprets them is set forth in the appendix to this brief.

STATEMENT OF THE CASE

Discovery is an Ohio corporation that provides non-credit educational, recreational and social programs to interested persons in Cincinnati for various fees. (J.A. 26-27.) In order to sell its programs Discovery publishes an advertising brochure nine (9) times per year. (*Id.*) Approximately one-third (1/3), or thirty-three percent (33%) of these brochures are given away to pedestrians through metal newsrack-type dispensing devices placed on the sidewalk in thirty-eight (38) locations in Cincinnati. (*Id.* at 27.)

Harmon is a New Jersey corporation registered and doing business in Ohio as a foreign corporation, that publishes and distributes free advertising brochures which advertise real estate for sale in various locations. (*Id.* at 26-27.) Approximately fifteen (15%) percent of these brochures are distributed to pedestrians through the use of red plastic newsrack-type dispensers in twenty-four (24) locations on the public sidewalks of Cincinnati. (*Id.* at 27.)

"Home Magazine," as Harmon's brochures are titled, consists primarily of listings and photographs of residential properties available in the Greater Cincinnati area, but occasionally includes information about market trends and other real estate matters. (*Id.* at 166-167.) Discovery's brochure contains information about the courses and programs offered by Discovery and is intended to directly promote registration in those courses and programs. Both publications are merely advertisements focused upon attracting customers. Neither brochure is a "newspaper." (*Id.* at 28, 29, 139, 166.)

Pursuant to C.M.C. Section 714-23, Cincinnati prohibits the distribution of all publications that constitute "commercial handbills," as defined in C.M.C. Section 714-1-C, on public property. (*Id.* at 27.) C.M.C. Sections 714-1-N, 911-17 and 862-1, however, specifically authorize the distribution of newspapers in the public rights-of-way through the use of newsrack-type dispensers and other means. (*Id.* at 28.)

On or about March 8, 1990, Cincinnati, through its Director of Public Works, notified both Harmon and Discovery that their publications constituted commercial handbills and ordered respondents to remove their dispensing devices from the public right-of-way. (*Id.* at 29.) Discovery and Harmon appealed the decision of the Director of Public Works to a three-member appeals committee but the decision of the Director of Public Works was upheld. (*Id.* at 30.) Thereafter, on June 1, 1990, respondents filed suit in the United States District Court for the Southern District of Ohio, Western Division, pursuant to 42 U.S.C. §1983 claiming that Cincinnati's regulatory scheme violated their First and Fourteenth

Amendment rights of free speech and due process and seeking declaratory and injunctive relief as well as attorneys' fees. (*Id.* at 3.)

At trial, Mr. Robert Richardson, principal city architect, testified on behalf of Cincinnati. (*Id.* at 62.) Mr. Richardson stated that his duties include the design and upkeep of the "streetscape" which consists of the public right-of-way and sidewalk area (*Id.* at 178-179.) and encompasses the sidewalk paving, lighting systems, landscaping or trees, plus any street furniture or hardware along the City right-of-way. (*Id.* at 179.) In designing a streetscape system, esthetics are an important consideration. (*Id.* at 180.) In fact, one major purpose for designing streetscapes is to improve the appearance of the area in order to impress visiting business people and tourists. (*Id.*) Another is to support private development. (*Id.* at 180-181.) Since Cincinnati is in competition with other cities to attract development and retain business, keeping the public portions of the streets esthetically pleasing is important to the City's continued vitality. (*Id.* at 181.)

Newsrack-type dispensing devices, such as those utilized by Discovery and Harmon, detract from the effectiveness of the streetscaping plans. (*Id.*) Streetscapes are designs starting with the lighting systems and determining the amount of light needed in relation to building foundations. (*Id.*) Traffic signals are likewise an important consideration. (*Id.*) Parking signs, parking meters, trash receptacles, and transformer boxes, are all incorporated into the streetscape. (*Id.* at 181-182.) However, newsrack-type dispensing devices are not designed into the system. (*Id.* at 182.) The devices are often randomly placed, where

they interfere with crosswalks and handicap ramps, and are frequently attached to light poles with bare chains which cause the poles to rust. (*Id.*) In Mr. Richardson's opinion, therefore, dispensing devices such as those utilized by Harmon and Discovery detract from the esthetics of the streetscape. (*Id.* at 183.)

Mr. Thomas Young, City Engineer, testified that in his opinion, the type of dispensing device utilized by respondents may detract from the safety of the right-of-way in several respects. (*Id.* at 193-194.) They may be placed within, or too close to, crosswalks so that they may hinder pedestrian traffic. (*Id.* at 194.) They may also obstruct handicap ramps. (*Id.*) They obstruct the visibility of motorists and pedestrians, particularly small children who are pedestrians. (*Id.*) They may also be placed so that they generally restrict the use of the sidewalk. (*Id.*)

The United States District Court for the Southern District of Ohio (Spiegel, J.) held that the application of Cincinnati's statutory scheme violated Harmon's and Discovery's First Amendment rights of free speech and consequently violated 42 U.S.C. Section 1983. (*Id.* at 35.) The District Court ruled in the City's favor on the due process claim. (*Id.*)

The District Court found that respondents advertising brochures constitute commercial speech since both

publications propose commercial transactions and are primarily advertisements. (*Id.* at 31.) Neither publication contains noncommercial speech that is inextricably intertwined with commercial speech. (*Id.*) Therefore, the test advanced by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980) controlled. (*Id.*)

The Court found that Cincinnati may regulate newsrack-type dispensing devices pursuant to its substantial government interest in promoting safety and esthetics on or about the public right-of-way under *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984). (*Id.*) However, the District Court found that prohibiting Discovery and Harmon from affixing their newsrack-type dispensers to the public right-of-way is an "excessive means" by which to accomplish Cincinnati's objectives of safety and esthetic appeal. (*Id.* at 32.) Noting that the number of newsrack-type dispensers on Cincinnati's public rights-of-way containing purely advertising material was small in comparison to the number of newspaper dispensing devices, the Court stated that newsrack-type dispensers containing purely advertising material affected public safety and esthetics in "only a minimal way." (*Id.*) The District Court also noted that other communities chose to deal with safety and esthetics problems by regulating the size, shape and color of various dispensing devices. The District Court held that Cincinnati's statutory scheme did not reasonably fit the governmental objectives of safety and esthetics sought to be promoted, as required by *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). (*Id.* at 32.) The parties had previously stipulated that plaintiff's advertising brochures concerned lawful activities and were not misleading. (*Id.* at 31.)

The Sixth Circuit Court of Appeals affirmed the decision of the District Court. (*Id.* at 58.) The Court, in fact, went beyond the holding of the District Court and held that commercial speech may be regulated differently than non-commercial speech only when the regulations deal with the content of the speech itself, or with distinctive effects produced by the content of the speech. (*Id.* at 51-52.) The Court noted that *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) held that a San Diego ordinance similar in effect to Cincinnati's ordinance was a permissible regulation of commercial speech, but since *Metromedia* was a plurality opinion on that issue, the Sixth Circuit Court did not consider the case binding on that point. (*Id.* at 49 n.9.)

The Court stated that all commercial speech regulations previously upheld the regulation sought to ban speech which was itself believed to be inherently false or misleading, or the regulation sought to alleviate adverse effects allegedly caused by and directly flowing from the type of speech regulated. (*Id.* at 49-50.) Since Cincinnati's statutory scheme was not directed toward either of these objectives, the scheme did not "reasonably fit" the governmental objective sought to be advanced absent some content based justification. (*Id.* at 53.) However, the Sixth Circuit held that Cincinnati would have to treat both commercial and noncommercial publications similarly. (*Id.* at 53-54.) No preference for noncommercial speech due solely to its noncommercial nature is permitted by the Sixth Circuit Court's decision. Rather, commercial and noncommercial publications must be afforded equal First Amendment protection absent a content based restriction. (*Id.*)

Further, the Court held that Cincinnati's statutory scheme did not qualify as a reasonable time, place or manner restriction, since it was not "content neutral." (*Id.* at 54.) In so holding the Court noted that Cincinnati could not treat newsrack-type dispensing devices distributing advertisements differently from those devices distributing commentary on public affairs. (*Id.* at 56.) The Court also stated that even if the statutory schemes were "content neutral" the scheme would fail because it was not "narrowly tailored to serve a significant governmental interest." The Court of Appeals interpreted the "narrowly tailored" requirement as a "least restrictive means" standard. (*Id.* at 57.)

The decision of the Court of Appeals was filed on October 11, 1991. The petition for writ of certiorari was filed on January 9, 1992 and was granted by this Court on March 9, 1992.

SUMMARY OF ARGUMENT

Cincinnati's statutory scheme, which prohibits Discovery and Harmon from affixing newsrack-type advertising dispensers to city sidewalks, satisfies the four elements required under *Central Hudson Gas & Electric Corp. v. Public Service Comm'n. of New York*, 447 U.S. 557, 566 (1980). Under *Central Hudson* a governmental regulation on commercial speech will be upheld if: 1) it regulates commercial speech; 2) it promotes a substantial governmental interest; 3) it directly advances that interest; and 4) it burdens no more speech than is necessary to promote the substantial governmental goal. *Id.*

The Court of Appeals held that Cincinnati's regulatory scheme, as applied to Discovery and Harmon, did not satisfy the fourth prong of the test. The Court reasoned that since alternative methods of regulation existed, which may have been less burdensome upon Discovery's and Harmon's advertising brochures, that the scheme burdened more speech than necessary to promote Cincinnati's substantial interest in the safety and esthetics of its rights-of-way. The Court of Appeals further held that Cincinnati could not prohibit distribution of Discovery's and Harmon's advertising brochures through newsrack-type dispensers unless Cincinnati could show that either: 1) the speech involved was inherently false or misleading; or 2) there existed distinctive adverse effects caused by and directly flowing from the type of commercial speech regulated.

The Court of Appeals erred on all of these points. The validity of commercial speech regulation does not depend upon a lack of less restrictive alternatives. *Bd. of Trustees State University of New York v. Fox*, 492 U.S. 469 (1989) holds that the application of the *Central Hudson* test is similar to the application of the test for time, place and manner restrictions. Time, place and manner regulations are not required to be the least restrictive means usable. As long as the regulation is not substantially more burdensome than necessary to further the governmental goal, the regulation will be upheld. The focus is upon the burden upon speech and the governmental purpose as a whole. The degree to which such purpose is furthered in a particular case is irrelevant. Further, local lawmakers are to be accorded some deference in deciding upon the appropriate regulatory means to further their particular

goals. In this case, Cincinnati has burdened *less* speech than necessary to totally accomplish its goals, since sidewalks will remain visually and physically cluttered by newsrack-type dispensers dispensing noncommercial forms of speech such as newspapers. The content based factors suggested by the Court of Appeals are inapplicable to a *Central Hudson* analysis since *Central Hudson* assumes truthful speech that is not misleading. Furthermore, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) should be considered binding in the Sixth Circuit, as it relates to commercial speech, based both upon its reasoning and upon the number (7) of justices concurring in that portion of the opinion.

Additionally, the Court of Appeals erred in holding that Cincinnati's regulatory scheme was not a reasonable time, place and manner restriction. Reasonable time, place and manner restrictions are permissible provided the restrictions are justified without regard to the content of commercial speech, they are narrowly tailored to serve that interest and they leave open ample alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

In determining content neutrality in time, place, and manner cases the principal inquiry is whether the government has adopted a regulation of speech because of a disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral. Cincinnati's scheme prohibiting the placement of newsrack-type dispensers containing advertising brochures on city sidewalks seeks only to promote the safety and esthetic appearance of

Cincinnati public ways and is therefore content neutral. Cincinnati does not disagree with any message conveyed by Discovery's or Harmon's advertising brochures.

As was noted, Cincinnati's regulatory scheme, as applied to Discovery and Harmon, is narrowly tailored to serve Cincinnati's interests in the safety and esthetics of its public ways. It burdens no more speech than is necessary to promote those goals. In fact, it has stopped short of fully accomplishing its goals, for it permits newsrack-type dispensers containing newspapers.

Finally, ample alternative channels of communication are open to Discovery and Harmon. Harmon distributes only fifteen percent (15%) of its brochures through newsrack-type dispensers. Discovery distributes one-third (1/3), or thirty-three percent (33%) of its brochures in this manner. Therefore, alternative modes of communication are both open and are being utilized by both Discovery and Harmon. Cincinnati's regulatory scheme as applied to Discovery's and Harmon's affixing newsrack-type dispensers to city rights-of-way is a reasonable time, place and manner regulation.

ARGUMENT

I. CINCINNATI'S REGULATORY SCHEME PROHIBITING THE PLACEMENT OF DISCOVERY'S AND HARMON'S NEWSRACK-TYPE ADVERTISING DISPENSERS UPON CITY SIDEWALKS BURDENS NO MORE SPEECH THAN IS NECESSARY TO FURTHER THE CITY'S SUBSTANTIAL GOVERNMENTAL INTEREST IN THE SAFETY AND ESTHETICS OF ITS PUBLIC RIGHT-OF-WAY.

A. Cincinnati's regulatory scheme does not burden substantially more speech than is necessary to further its interest in the safety and esthetics of its public right-of-way.

In determining whether Cincinnati's regulatory scheme was constitutional as applied to the exclusion of Discovery's and Harmon's newsrack-type advertising dispensers from city sidewalks, the Court of Appeals correctly utilized this Court's test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980). That test provides that a government regulation will be upheld if the regulation: (1) regulates commercial speech; (2) promotes a substantial governmental interest; (3) directly advances that interest; and (4) is not more extensive than is necessary to accomplish this substantial governmental objective. *Id.* (J.A. 44)

The Court of Appeals also correctly noted that Cincinnati's regulatory scheme satisfied the first three prongs of the *Central Hudson* test: 1) the scheme regulates purely commercial speech[1]; 2) Cincinnati's interest in

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[1] The Court of Appeals incorrectly implies, however, that the City of Cincinnati's regulatory scheme may be applied to

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providing a safe and esthetic right-of-way is substantial; 3) Cincinnati's regulatory scheme directly promotes and advances its substantial governmental interest in providing a safe and esthetic right-of-way. (*Id.*)

This Court has repeatedly stated that governmental restrictions upon commercial speech may be no more broad or no more expansive than "necessary" to serve its substantial interests. See *e.g. Central Hudson*, 447 U.S. at 556; *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507-508 (1981) (plurality opinion); *In re: R.M.J.*, 445 U.S. 191, 203 (1982); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 694 (1985); *Posadas de Puerto Rico Assocs. v. Tourism Company of Puerto Rico*, 478 U.S. 328, 343 (1986); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 535 (1987); *Shapero v. Kentucky Bar Assoc.*, 486 U.S. 466, 472 (1988). If the word "necessary" is interpreted strictly, these statements would translate into a "least restrictive means" test. *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 476 (1989). However, as this Court stated in *Fox*, the

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prohibit newspapers from distributing within the public right-of-way. Section 862-1 of the Cincinnati Municipal Code states in pertinent part: "Permission is hereby granted to any person or persons lawfully authorized to engage in the business of selling newspapers to occupy space on the sidewalks of city streets for selling newspapers . . . ". Furthermore, Section 911-17 of the Cincinnati Municipal Code states in part: "newspapers of general circulation in the City of Cincinnati may be sold from racks, containers and bags attached to poles and other structures on city sidewalks in accordance with rules and regulations promulgated by the city manager relating to the safety and unobstructed use of the streets by vehicular and pedestrian traffic." The concern of the Court of Appeals, then, is clearly unfounded.

fourth prong of the *Central Hudson* test requires something short of a least restrictive means standard. *Id.* at 477.

Commercial speech enjoys a limited measure of First Amendment protection, commensurate with its subordinate position in the scale of First Amendment values and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression. *Id.* at 477. (citing *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978). The ample scope of regulatory authority suggested by this statement would be illusory if it were subject to a least restrictive means requirement, which imposes a heavy burden upon the State. *Id.*, (citing *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).)

Least restrictive means requirements have not been imposed – even where core political speech is at issue – in assessing the validity of time, place and manner restrictions.[2] *Fox*, 492 U.S. at 477-478. Such restrictions are upheld so long as they are "narrowly tailored" to serve a significant governmental interest, a standard that has not been interpreted to require elimination of all less restrictive alternatives. *Id.* at 478. This is also true with respect

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[2] The "time, place and manner" analysis, however, would appear to impose more of a burden upon the government. This makes sense, since time, place and manner restrictions may burden noncommercial speech as well as purely commercial speech. For example, time, place and manner regulations must be "content neutral." While Cincinnati's statutory scheme in the present case happens to be content neutral, there is no requirement of content neutrality in the *Central Hudson* test. As the Court of Appeals later noted, some commercial speech regulations upheld by this Court have indeed been content based.

to Government regulation of expressive conduct, including conduct expressive of political views. In requiring a regulation to be "narrowly tailored" to serve an important or substantial state interest, the First Amendment does not require that there be no conceivable alternative, but only that the regulation burden not "substantially more speech than is necessary to further the government's legitimate interest." *Fox*, 492 U.S. at 478. (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). The Court has been loath to second-guess the Government's judgment to that effect. *Id.*, (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. at 299; *United States v. Albertini*, 472 U.S. 675, 689 (1985)). In *San Francisco Arts & Athletics, Inc. v. United States Olympics Committee*, 483 U.S. 522, 537 at n. 16 (1987), this Court stated that the application of the *Central Hudson* test was "substantially similar" to the application of the test for validity of time, place and manner restrictions upon protected speech – which has been specifically held not to require least restrictive means. (*See*, also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)).

No case invalidating the regulation of commercial speech involved a provision that went only marginally beyond what would adequately have served the governmental interest at stake. *Fox*, 492 U.S. at 479. To the contrary, almost all restrictions disallowed under *Central Hudson's* fourth prong have been substantially excessive disregarding "far less restrictive and more precise means". *Id.*, (citing *Shapero v. Kentucky Bar Assn.*, 486 U.S. at 476; *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)).

On the other hand, decisions *upholding* the regulation of commercial speech cannot be reconciled with a requirement of least restrictive means. Rather, this Court stated that it was up to the legislature to decide that point so long as its judgment was reasonable. *Id.* In *Posadas*, for example, where Puerto Rico's blanket ban on promotional advertising of casino gambling to Puerto Rican residents was upheld, this Court noted that the governmental goal of deterring casino gambling may have been adequately served "not by suppressing commercial speech that might *encourage* such gambling, but by promulgating additional speech designed to *discourage* it." 478 U.S., at 344. Similarly, in *Metromedia, Inc. v. San Diego*, 453 U.S. at 513 (plurality opinion) this Court upheld San Diego's complete ban of off-site billboard advertising without inquiring whether *any* less restrictive measure (for example, controlling the size and appearance of the signs) would suffice to meet the City's concerns for traffic safety and esthetics. *Metromedia*, 453 U.S. at 508. The Court noted:

> "Similarly, we reject appellants' claim that the ordinance is broader than necessary and therefore fails the fourth part of the *Central Hudson* test. If the City has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The City has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows on-site advertising and some other specifically exempted signs." *Id.* (*See*, also *Chicago Observer, Inc. v. City of Chicago*, 929 F.2d 325 (7th Cir. 1991); *Don's*

Porta Signs, Inc. v. City of Clearwater, 874 F.2d 1051, 1054.)

Similarly, if Cincinnati has a sufficient basis for believing that Discovery's and Harmon's newsrack-type advertising dispensers interfere with pedestrian and vehicular traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. Like the City of San Diego, Cincinnati has gone no further than necessary in seeking to meet its ends. In fact, it has stopped short of fully accomplishing its ends. It has not prohibited all newsrack-type dispensing devices, but specifically allows newsracks containing newspapers and other noncommercial forms of speech. The safety and esthetics of Cincinnati's public ways will continue to be adversely affected by the presence of newsrack-type dispensers containing noncommercial publications. Therefore, Cincinnati has actually burdened *less* speech then would be necessary to fully accomplish its governmental objective.

The Court of Appeals improperly focused on the admittedly incomplete *effect* of the regulatory scheme as applied. The Court stated:

> "If commercial speech has a high value in the *Fox* calculus absent the two specific circumstances[3], then Cincinnati's ordinance cannot be

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[3] The two specific circumstances were part of a "test" announced by the Court of Appeals requiring governmental regulations burdening commercial speech to: 1) deal with the *content* of the speech itself (that speech which is believed to be

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a "reasonable fit". Plaintiffs will bear a heavy burden by being completely deprived[4] of access

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inherently false or misleading); 2) seek to alleviate *distinctive adverse effects* allegedly caused by and directly flowing from the speech itself. (J.A. 49-50.) This "test" is not to be found anywhere in any previous decision of this court. Since this Court's decision in *Central Hudson*, it has been clear that the government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity. *Central Hudson*, 447 U.S., at 563, 564. There is no requirement that government adhere to other strictures contained within the *Central Hudson* analysis for regulating those types of speech. The *Central Hudson* requirements only apply when the commercial speech regulated is neither misleading nor related to unlawful activity. The Court of Appeals correctly notices this (J.A. 47) then apparently ignores itself. The "test" proposed by the Court of Appeals, then, would apply the *Central Hudson* test only when the speech itself is misleading or relates to conduct that is illegal or less "distinctive" adverse effects. Simply put, that is *not* the *Central Hudson* test.

Furthermore, in advancing its test the Court of Appeals correctly noted that *Metromedia* required no such content based determinations, but held that since *Metromedia* was a plurality opinion, it was not binding precedent (J.A. 9.) However, seven (7) out of nine (9) justices of this Court agreed that San Diego's ordinance prohibiting offsite billboard advertising was permissible as applied to commercial speech. *Metromedia* (Justice White, Justice Stewart, Justice Marshall, and Justice Powell, in the plurality opinion) (Chief Justice Burger, dissenting) (Justice Stevens, dissenting in part) (Justice Rehnquist, dissenting in part).

[4] Plaintiffs are not "completely deprived of access" to city streets, rather, they simply may not appropriate city sidewalks on a semi-permanent basis. Discovery and Harmon are free to

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> to the city streets. Discovery currently distributes 33% of its magazines through newsracks banned by the ordinance; Harmon 15%. The *benefit* gained by the city, on the other hand, is miniscule (sic). Plaintiffs own only 52 of the between 1,500 and 2,000 newsracks currently on city streets. As commercial speech has public and private benefits apart from the burdens directly placed on Discovery Network and Harmon, the burden on it by Cincinnati's ordinance cannot be justified by the *paltry gains* in safety and beauty achieved by the ordinance." (J.A. 53)

Apparently, then, the Court of Appeals focused upon the "paltry" or "miniscule" *effects* of banning Discovery's and Harmon's advertising dispensers from Cincinnati sidewalks. However, that is not the proper focus of the fourth prong of the *Central Hudson* test. The regulation must ban no more speech than is necessary to further the substantial governmental interest to pass muster under *Central Hudson*. There is no requirement that the interest be furthered a particular degree or a certain amount (i.e. something above "paltry" or "miniscule"). Rather, the focus is upon the relation the regulation bears to the

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communicate with others on the sidewalk in numerous other methods, i.e., verbal communication. The First Amendment does not guarantee the right to employ every conceivable method of communication at all times in all places. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S., at 647. The Court of Appeals itself notes that Discovery distributes two thirds (2/3) or sixty six percent (66%) of its advertising magazines through other sources. Likewise, Harmon distributes eighty-five percent (85%) of its magazines through other means. (J.A. 53.) Clearly, then, alternative modes of communication are available.

overall problem the government seeks to correct, not on the extent it furthers the government's interest in a particular case. In the present case, Cincinnati's regulatory scheme, as applied to Discovery's and Harmon's advertising dispensers, does not burden more speech than is necessary to further the City's interest in the safety and esthetics of its public sidewalks.

In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) the Court noted:

> "The validity of (time, place or manner) regulations[5] does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the *degree* to which those interests should be promoted." 491 U.S., at 800 (citations omitted.)
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> "Government may not regulate expression in such a manner that a *substantial portion* of the burden on speech does not serve to advance its goals." *Id.* at 799.
>
> "[T]he validity of the regulation depends on the relation it bears to the *overall problem* the government seeks to correct, not on the *extent* to which it furthers the government's interest in a particular case." *Id.* at 801.

In the present case, all of the speech incidentally burdened by the regulatory scheme furthers Cincinnati's substantial governmental interest in providing a safe and

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[5] In *Fox* this Court held that the application of the *Central Hudson* test is substantially similar to the application of the test for validity of time, place and manner restrictions upon commercial speech. *Fox*, 492 U.S. at 477.

esthetically pleasing public sidewalk. The fact that Cincinnati is not completely achieving its goal by prohibiting only those dispensers containing advertising materials is irrelevant.[6] *Central Hudson* requires no "balancing test" of speech burdened against interest served. All of the speech regulated by Cincinnati's refusal to allow Discovery and Harmon to affix newsrack-type advertising dispensers to Cincinnati sidewalks[7] furthers the City's

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[6] In *Metromedia* this Court stated:

> "In the first place, whether on-site advertising is permitted or not, the prohibition of off-site advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that this ordinance is underinclusive because it permits on-site advertising. Second, the city may believe that off-site advertising with its periodically changing content presents a more acute problem than does on-site advertising. (Citations omitted.) Third, San Diego has obviously chosen to value one kind of commercial speech, on site advertising – more than another kind of commercial speech, off-site advertising. The ordinance reflects a decision by the City that the former interest, but not the latter, is stronger than the City's interests in traffic safety and esthetics . . . it does not follow from the fact that the City has concluded that some commercial interests in this context that it must give similar weight to all other commercial advertising." 453 U.S. 490, at 512.

Nor must Cincinnati treat all newsrack-type dispensers equally.

[7] With regard to affixing objects, such as newsrack-type dispensers to the public right-of-way, this Court noted in

(Continued on following page)

interest in the safety and esthetics of its public way. Cincinnati is merely refusing to allow Discovery or Harmon to appropriate public property, on a semi-permanent basis, in order to advertise their services to the exclusion of the use of the general populace. In fact, it burdens no speech outside the public way. Both Discovery and Harmon are free to sell their wares through the mail and upon the property of consenting private landowners, including bookstores and newsstands. Indeed the record reflects that most of Harmon's (85%) and Discovery's (66%) advertising brochures are distributed outside of newsrack-type dispensers. Consequently, Cincinnati's refusal to allow Discovery and Harmon to place newsrack-type dispensers in the public right-of-way burdens no more speech than is necessary to further its substantial governmental interests.

(Continued from previous page)

Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750 (1988) (White, J. dissenting):

> "The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting . . . This use is common to all members of the public, and it is a use open equally to all citizens . . . But the use made by the telegraph company is, in respect to so much of the space it occupies with its poles, is permanent and exclusive . . . Whatsoever benefit the public may received in the way of messages, that space is, so far as respects its actual use for the purpose of highway and personal, wholly lost to the public." *Id.* at 779-780. (Citing *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 98-99 (1983)).

Regarding the hypothetically less restrictive methods by which Cincinnati may further its substantial interests in providing a safe and esthetic right-of-way, the Court of Appeals stated:

> "In contrast to Cincinnati's fears, it has many options to it to control the perceived ill effects of newsracks, apart from banning those dispensing commercial speech. To the extent that the use of chains to fasten the newsracks is unsafe, a regulation requiring that all newsracks be bolted to the sidewalk would solve the problem. To the extent that esthetics are a concern, a regulation establishing color and design limitations upon all newsracks would fit the bill. In fact, counsel for Cincinnati admitted at oral argument that it is currently working on an ordinance of this sort with representatives of traditional newspapers. To the extent that the number of newsracks is disturbing, the city can establish a maximum number of newsracks permitted on city sidewalks and distribute them either through first-come, first-serve permit rationing or by selling permits to the highest bidder. We are confident that many more options exist for the city, so long as they do not treat newsracks differently according to the content of the publication inside." (J.A. 53-54)

The first two suggestions of the Court of Appeals that Cincinnati promulgate regulations requiring newsrack-type dispensers to be bolted to the sidewalk and establishing guidelines for color and design may be permissible. They may even be good suggestions. However, they simply do not reflect the judgment of Cincinnati's local lawmakers that newsrack-type dispensers containing solely commercial speech should not be permitted to

occupy city sidewalks on a semi-permanent basis. In other words, while Cincinnati legislators may have chosen to effectuate their goals of safe and esthetic public ways in the manner suggested by the Court of Appeals, they did not do so and they are not *required* to do so under the First Amendment. City legislators may decide that, with regard to newsrack-type dispensers affixed to the sidewalk, the best way to alleviate the problems posed is to prohibit them, so long as the regulation comports with the requirements of the *Central Hudson* test. In *Ward* this Court noted:

> "So long as the means chosen are not 'substantially broader' than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less speech restrictive alternative." 491 U.S. at 800.
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> "The alternative regulatory methods hypothesized by the Court of Appeals reflect nothing more than a disagreement with the city over how much control of volume is appropriate, or how that level of control is to be achieved. (Citations omitted) The Court of Appeals erred in failing to defer to the City's reasonable determination that its interests in controlling volume would be best served by requiring Bandshell performers to utilize the city's sound technicians." *Id.*

Cincinnati's decision not to permit newsrack-type dispensers containing commercial publications is not constitutionally infirm merely because the Court of Appeals can construct less restrictive measures that might promote the city's goals. Rather, the Court must defer to

Cincinnati's legislative determination that their goals can best be furthered by refusing to permit newsrack-type dispensers containing only commercial speech being affixed to the sidewalk.

More troubling, however, are the Court of Appeals' suggestions that Cincinnati may establish a maximum number of newsrack-type dispensers permitted on city sidewalks[8] and "distribute them either through first-come first-serve permit rationing or by selling permits to the highest bidder". (J.A. 54) Nowhere in available First Amendment jurisprudence is First Amendment protection found to be dependent upon the alacrity with which one applies for a permit, nor especially upon how much money one has available to spend on such a permit. Both of these suggestions present serious constitutional problems. The first-come first-serve option would obviously favor existing, more established publishers who would quickly become familiar with the permitting system. Favoring established publications over publications that are not well established runs directly contrary to core First Amendment values of fostering a robust exchange of differing opinions in a market place of ideas. Rather, such a system would favor the entrenchment of existing, well accepted viewpoints over those who would challenge such views. It would also involve government in allowing established publishers sole and exclusionary use of public sidewalks. Such a system is obviously flawed. Favoring publications with the most money to spend would create

[8] Which the city may, and as a practical matter must do if any space on the sidewalk is to be preserved for pedestrian and other traffic.

much the same problems, and is completely abhorrent to any value to be found within the Constitution. City streets and sidewalks are held in trust for the public, this means all the public[9] not just those "highest bidders" with the ability to pay. Cincinnati's lawmakers should be applauded, not criticized, for having the judgment, wisdom and foresight to avoid such schemes.

This Court has repeatedly held that regulatory schemes which burden both commercial and noncommercial speech may not favor commercial speech over noncommercial speech. As this Court held in *Metromedia*:

> "[O]ur recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech. . . . Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may *not* conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." 453 U.S., at 513.

This Court also held in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 455-56 (1978):

> "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a levelling process of the force of the Amendments guarantee with respect to the latter kind of speech." *Id.*

[9] *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 779 (White, J. dissenting) (Citing *Hague v. CIO*, 307 U.S. 496, 515 (1939).

Cincinnati, therefore, could run afoul of First Amendment protections afforded noncommercial speech by affording newsrack-type dispensers containing commercial speech like treatment with newsracks containing noncommercial speech. It is obvious that the amount of sidewalk space available to accommodate newsrack-type dispensing devices is finite. To the extent that all newsrack-type dispensers are afforded an equal opportunity to be affixed to city sidewalks, dispensers containing commercial publications may displace dispensers containing noncommercial publications or prevent dispensers containing noncommercial speech from occupying sidewalk space. In other words, equal treatment may act as a *de facto* obstruction to the distribution of noncommercial publications. Space which could be occupied by a newspaper or other noncommercial publication would be unavailable, having been previously appropriated by a dispenser containing a purely commercial advertisement, such as Discovery's or Harmon's advertising brochures. To the extent that space occupied by such commercial publications is unavailable to non-commercial publications, which have a greater degree of protection under cases such as *Ohralik* and *Metromedia*, a regulatory scheme permitting such a result is constitutionally impermissible.

In any event, Cincinnati's regulatory scheme as applied to the city's refusal to allow Discovery and Harmon to place their newsrack-type advertising dispensers to city sidewalks burdens no more speech than is necessary to promote the city's interest in maintaining a safe and esthetic right-of-way. Since the regulatory scheme as applied, satisfies all of the requirements of the *Central Hudson* test, the scheme must be upheld.

II. CINCINNATI'S REGULATORY SCHEME PROHIBITING DISCOVERY AND HARMON FROM PLACING THEIR NEWSRACK-TYPE DISPENSERS ON THE CITY'S SIDEWALKS IS A CONSTITUTIONAL TIME, PLACE AND MANNER REGULATION.

In *Ward*, this Court restated the test for determining whether a particular regulation is a constitutional time, place or manner restriction[10]:

> [T]he government may impose reasonable restriction on the time, place or manner of protected speech provided the restrictions are *justified* without regard to the content of the regulated speech, that they are *narrowly tailored* to serve a *significant governmental interest* and that they leave open *ample alternative channels* for communication of the information. (Emphasis added.) 491 U.S. at 741. (Citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648

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[10] While Cincinnati's regulatory scheme is a reasonable time, place and manner restriction it is not clear that the City must satisfy this test. It seems that a reasonable time, place and manner restrictions may subject the government to a slightly higher standard of scrutiny than the application of the *Central Hudson* test. This would make sense since reasonable time, place, and manner restrictions may be applied in a noncommercial speech context. For example, while time, place and manner restrictions must be "content neutral," regulation of commercial speech, measured against the *Central Hudson* standard may apparently be content based. *See*, e.g. *Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 378 (1986).

(1981); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).)

A. Content Neutrality

The principal inquiry in determining content neutrality in speech cases generally and in time, place and manner cases in particular is whether the government has adopted a regulation of speech because of disagreement of the message it conveys. *Clark v. Community for Creative Non-Violence*, 468 U.S., at 295. The government's *purpose* is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986). Government regulation of expressive activity is content-neutral so long as it is *justified* without reference to the content of the regulated speech. *Ward*, 491 U.S., at 491. In other words, the regulation in question must not contravene the fundamental principle that underlies "content based" speech regulations: that government may not grant the use of a forum to people whose *views* it finds acceptable, but deny use to those wishing to express less forward and more controversial *views*. *Renton*, 475 U.S., at 48-49.

The Court of Appeals incorrectly held that Cincinnati's regulatory scheme is not content neutral because it treats newsrack-type advertising dispensers differently than dispensers containing noncommercial speech. Cincinnati may treat dispensers containing commercial speech and noncommercial speech differently and in fact,

must treat them differently. *Metromedia*, 453 U.S. at 513,[11] *Ohralik*, 436 U.S. at 455-456. This differing degree of treatment for differing types of speech does not violate the content neutrality requirement. The regulatory scheme is directed solely at the esthetic and safety problems caused by newsrack-type dispensers and not at any viewpoint that the city finds objectionable with which Cincinnati disagrees.[12] Cincinnati is merely attempting to provide a safe and esthetically pleasant right-of-way; it is not attempting to "suppress the expression of unpopular views." *Renton*, 475 U.S. at 48. As this Court noted in *Renton*:

> "If the city had been concerned with restricting the *message* purveyed by adult theatres, it would have tried to close them or restrict their number rather than circumscribe their choice as to *location*." *Id.* (citing Justice Powell in *Young v. American Mini Theatres*, 427 U.S. 50 at 82 n.4.)

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[11] "Insofar as the city tolerates billboards at all, it cannot choose to limit their conduct to commercial messages: the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." *Id.*

[12] The Court of Appeals notes this is its opinion at page 13:

> "Neither is Cincinnati attempting to alleviate a harm caused by the *content* of the publications. Cincinnati is attempting to place a burden on a particular type of speech because of harms caused by the *manner* of delivering that speech." (J.A. 52.) (page 13 of 6th Cir. Opinion).

Similarly, if Cincinnati had been concerned with restricting the messages purveyed by Discovery and Harmon,[13] it would have tried to close them or restrict their numbers rather than merely preventing them from affixing newsrack-type dispensers to city sidewalks. Since the city's regulatory scheme is not directed toward the content, message, or viewpoint of the publications in question, but is directed toward keeping the sidewalks safe and esthetically pleasing, Cincinnati's regulations satisfy the content neutral requirement.

B. Narrowly tailored to serve a significant governmental interest.

It is undisputed that Cincinnati has a "substantial governmental interest" in the safety and esthetics of its public ways. *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984). Restrictions on the time, place or manner of protected speech are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *Ward*, 491 U.S. at 747 (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985). Such regulation need not be the least restrictive means of furthering the governmental goal. *Ward*, at 798. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. While government may not regulate expression in such a manner that a substantial portion of the burden on

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[13] The City has no quarrel with the actual content of the publications.

speech does not serve to advance its goals,[14] so long as the means chosen are not substantially broader than necessary to achieve the government's interest, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less speech restrictive alternative. The validity of time, place or manner regulations does not turn on a judge's agreement concerning the most appropriate method for promoting significant government interest, or the degree to which those interests should be promoted. *Ward*, 491 U.S., at 800. In *Ward*, this Court stated:

> It is undeniable that the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city's sound technician control the mixing band during performances. Absent this requirement, the city's interest would have been served less well, as evidenced by the complaints about excessive volume generated by respondent's past concerts. *Id.*

The Court of Appeals erroneously held that Cincinnati's regulatory scheme was not narrowly tailored because, it claimed, a wide range of less burdensome options was available to the city to further its goals of safety and esthetics. (J.A. 56.) That is irrelevant, as was earlier noted. The City is not required to use the least restrictive means. However, not allowing Discovery and

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[14] As has been noted, the application of Cincinnati's regulatory scheme to Discovery and Harmon actually burdens *less* speech than would be necessary to fully achieve Cincinnati's goals. No burden is placed on speech outside the sidewalks.

Harmon to affix their dispensers to the sidewalk does not burden substantially more speech than necessary to achieve Cincinnati's desired governmental goal. In fact, Cincinnati has burdened *less* speech than necessary to fully accomplish its ends, for it allows newsrack-type dispensers containing noncommercial speech. Therefore, Cincinnati's regulatory scheme, as applied in this case, is "narrowly tailored to serve significant governmental goals."

The Court of Appeals further held that the City's regulatory scheme was not content neutral because:

> "Cincinnati's hypothetical argument only addresses the enforcement of the ordinance.[15] The ordinance itself was on the books long before this problem arose. There is no argument advanced that the ordinance's ban on distribution of commercial handbills, by any method, not merely by newsracks, was not directed against commercial speech based on its content." (J.A. 56-57.)

It is difficult to see how the longevity of Cincinnati's regulatory scheme could possibly bear any relationship to whether or not the ordinance is content neutral. The two issues seemingly have nothing to do with one another.

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[15] Why the Court of Appeals focuses upon one ordinance out of an entire regulatory scheme cannot be explained. The ordinance to which the Court refers (C.M.C. § 714-23) is merely one part of an overall scheme. The scheme in its *totality* is the relevant inquiry; not merely one aspect of the scheme. However, as to the constitutionality of § 714-23, *see, Valentine v. Christensen,* 316 U.S. 52 (1942) (similar ordinance constitutional as applied to distribution of handbills).

Likewise, whether all or only one of the methods of distribution are permitted has no bearing upon the content neutrality requirement.[16] Since there is no logical relationship between these factors and the content neutrality requirement, it is relatively clear that the Court of Appeals erred in relying upon such factors to find that Cincinnati's regulatory scheme was not content neutral.

However, it seems the Court of Appeals seems to suggest that Discovery and Harmon may challenge Cincinnati's commercial handbill regulatory scheme as facially overbroad. Clearly, that is not the case. As the Court of Appeals repeatedly notes, Cincinnati's regulatory scheme, by its own terms, applies only to commercial speech. This Court has held that the overbreadth doctrine, an exception to the standing requirement, has no application in a "commercial speech"[17] context. *Bates v. State Bar of Arizona,* 433 U.S. 350, 379-381 (1977). As the opinion in *Bates* observed:

> "In the usual case involving a restraint on speech, a showing that the challenged rule served unconstitutionally . . . to suppress speech would end our analysis. In the First Amendment context the Court has permitted attacks on overly broad statutes without requiring that the person making the attack demonstrate that in

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[16] This inquiry more properly relates to whether there are ample alternative channels of communication available, the third prong of the test.

[17] Discovery and Harmon seek to distribute commercial *speech* as differentiated from those who may merely have a commercial *interest* in speech.

fact his specific conduct was protected. (citations omitted.) Having shown that the disciplinary rule interferes with protected speech appellants could expect to benefit, regardless of the nature of their acts.

The First Amendment overbreadth doctrine, however, represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the Court. (citations omitted.) The reason for the special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests and a person who contemplates protected activity might be discouraged by the in terrorem effect of the statute. (citations omitted.) Indeed, such a person might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged. The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted.

But the justification for the application of overbreadth analysis applies weakly if at all in the ordinary commercial context. As was acknowledged in *Virginia Pharmacy Board v. Virginia Consumers Council*, 425 U.S. at 771 n.24 there are 'commonsense differences' between commercial speech and other varieties. (citation omitted.) Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." *Id.* at

380-381. (Emphasis added.) (See also *Metromedia*, 453 U.S., at 504 n.11.)

Since Cincinnati's regulatory scheme affects only commercial speech, an overbreadth analysis is inappropriate. While the Court of Appeals did not specifically state that it was applying such an analysis, clarification is warranted. The overbreadth doctrine simply does not apply in a commercial speech context[18]. Rather, Discovery and Harmon must challenge Cincinnati's regulatory scheme as it applies to their particular conduct. Cincinnati's regulatory scheme prohibiting Discovery and Harmon from affixing newsrack-type advertising dispensers to public sidewalks is narrowly tailored to serve Cincinnati's significant governmental interest in providing a safe and esthetically pleasant right-of-way.

The Court of Appeals also interpreted this prong of the reasonable time, place and manner regulation test as requiring "government to choose the *least restrictive means* to further the governmental interest." (J.A. 57-58.) However, this Court noted in *Ward*[19]:

> Lest any confusion on the point remain, we reaffirm today that a regulation of time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate

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[18] This is also true with regard to the application of the *Central Hudson* test. Overbreadth analysis simply is inapplicable under *Bates*.

[19] Somewhat confusingly the Court of Appeals actually cites *Ward* at page 15 of its Opinion. (J.A. 56.)

> content neutral interests but that it need *not* be the least-restrictive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that could be achieved less effectively absent the regulation." (citations omitted.) *Ward*, 491 U.S., at 748.

The Court of Appeals, therefore, erred in holding Cincinnati's regulatory scheme to a least restrictive means standard.

C. Ample Alternative Channels

In order to be upheld as constitutional, time, place and manner regulations must leave open ample alternative channels for communication of the information. *Clark v. Community for Non-Violence*, 468 U.S. 288, 293 (1984). Sixty-six percent (66%) or two thirds (2/3) of Discovery's advertising brochures are distributed through means other than newsrack-type dispensers. Eighty-five percent (85%) of Harmon's advertising brochures are distributed through means other than newsrack-type dispensers. Cincinnati's regulatory scheme narrows only one channel of communication. It does not prohibit Discovery or Harmon from distributing their advertisements through the mail or on the property of consenting landowners (i.e., bookshops, newsstands, etc.) Unlike some regulatory schemes, Cincinnati's does not prohibit advertisements related to a particular topic,[20] it merely restricts access to public sidewalks, in order to promote the beauty and

[20] *See, Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

safety of the urban landscape.[21] Ample alternative methods remain available to and are being utilized by both Discovery and Harmon to communicate their commercial messages.

Since Cincinnati's regulatory scheme satisfies all tests for reasonable time, place or manner restrictions as applied to prohibiting Discovery and Harmon from affixing newsrack-type advertising dispensers to city sidewalks, it is constitutional and must be upheld.

CONCLUSION

For the above reasons, petitioner urges this Court to reverse the decisions of the Court of Appeals and the District Court and uphold petitioner's statutory scheme as constitutional as applied and enter judgment in favor of petitioner Cincinnati.

Respectfully submitted,

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[21] *See, Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

APPENDIX

§ 714-1-C. Commercial Handbill.

"Commercial Handbill" shall mean any printed or written matter, dodger, circular, leaflet, pamphlet, paper, booklet or any other printed or otherwise reproduced original or copies of any matter of literature:

(a) Which advertises for sale any merchandise, product, commodity or thing; or

(b) Which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of directly promoting the interest thereof by sales; or

(c) Which directs attention to or advertises any meeting, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit.

(Sec. 759-1-C; ordained by Ord. No. 119-1971, eff. Apr. 30, 1971; renumbered to C.M.C. 714-1-C, eff. Jan. 1, 1972; a. Ord. No. 519-1985, eff. Dec. 14, 1985; a. Ord. No. 353-1986, eff. Oct. 24, 1986.

§ 714-1-N. Non-Commercial Handbill.

"Non-commercial handbill" shall mean printed or written matter, any sample or device, dodger, circular, leaflet, pamphlet, newspaper, magazine, paper, booklet or any other printed or otherwise reproduced original or copies of any matter of literature not included in the aforementioned definitions of a commercial handbill.

(Sec. 759-1-N; ordained by Ord. No. 119-1971, eff. Apr. 30, 1971; renumbered to C.M.C. 714-1-N, eff. Jan. 1, 1972)

§ 714-23. Throwing or Distributing Handbills in Public Places.

No person shall throw or deposit any commercial or non-commercial handbill in or upon any sidewalk, street or other public place within the city. Nor shall any person hand out or distribute or sell any commercial handbill in any public place. Provided, however, that it shall not be unlawful on any sidewalk, street or other public place within the city for any person to hand out or distribute, without charge to the receiver thereof, any non-commercial handbill to any person willing to accept it, except within or around the city hall building.

(Sec. 759-23; ordained by Ord. No. 119-1971, eff. Apr. 30, 1971; renumbered to C.M.C. 714-23, eff. Jan. 1, 1972)

Penalty, Sec. 714-99, 714-99-A.

§ 862-1. Selling Newspapers on Streets.

Permission is hereby granted to any person or persons lawfully authorized to engage in the business of selling newspapers to occupy space on the sidewalks of city streets for selling newspapers, either in the morning or afternoon, where permission has been obtained from the owner or tenant of the adjoining building.

(C.O. 737-3; a. Ord. No. 414-1970, eff. Dec. 23, 1970; renumbered to C.M.C. 862-1, eff. Jan. 1, 1972)

§ 911-17. Posting Bills on Streets.

No person shall hang or track upon or attach to any pole or other structure on any street, avenue, alley, park or public ground of the city, any handbill, card, circular or other printed material, including directional signs; provided, however, that signs may be posted with the permission of the city manager or the director of public works designating the location or direction of institutions of higher learning having an enrollment in excess of 500, stadiums or arenas having a seating capacity in excess of 12,000, the Cincinnati Zoo, the Cincinnati Union Terminal, publicly-owned parks and playfields, publicly-owned parking facilities, publicly-owned airports, the municipal vehicle testing lane, publicly-owned buildings, highway destinations, highway routes, business districts located off major thoroughfares, churches located off through highways, bridges, interchanges, or ramp connections, the Art Museum; provided further that temporary signs for special events by charitable institutions may be posted with the approval of the city manager; provided further, that temporary signs giving notice of public hearings of agencies of the city of Cincinnati may be posted in locations approved by the city manager; and provided further that newspapers of general circulation in the city of Cincinnati may be sold from racks, containers and bags attached to poles and other structures on city sidewalks in accordance with rules and regulations promulgated by the city manager relating to the safety and unobstructed use of the streets by vehicular and pedestrian traffic.

Whoever violates this section shall be guilty of posting bills on streets, a minor misdemeanor.

(C.M.C. 911-17; ordained by Ord. No. 523-1973, eff. Jan. 1, 1974; a. Ord. No. 413-1976, eff. Sept. 9, 1976)

Analogous to C.O. 901-p9; a. Ord. No. 246-1957, eff. July 19, 1957; a. Ord. No. 334-1959, eff. Oct. 30, 1959; a. Ord. No. 24-1960, eff. Feb. 19, 1960; a. Ord. No. 400-1960, eff. Dec. 23, 1960; a. Ord. No. 156-1966, eff. May 27, 1966; a. Ord. No. 414-1970, eff. Dec. 23, 1970; a. Ord. No. 156-1973, eff. May 4, 1973; r. Ord. No. 523-1973, eff. Jan. 1, 1974.

EXHIBIT 1

AMENDED REGULATION NO. 38

In accordance with Section 911-17 of the Cincinnati Municipal Code, the following rules and regulations are promulgated in regard to the dispensing of newspapers of general circulation from devices located within the Public Right-of-Way.

1. All devices located within the public right-of-way for the purpose of dispensing newspapers must be shown on a site plan of the immediate vicinity of the device. The site plan must show all existing street furniture including other newspaper dispensing devices. The site plan shall be of such scale and detail to allow the reasonable determination of pedestrian obstruction, aesthetics, driver sight distance and any other factor influencing the public safety. The method of attachment of each newspaper device to the sidewalk, post or other fixed object shall be depicted on the site plan. Where attachment is impracticable, an explanation of same is required. The site plan and request to place newspaper vending device in public right-of-way must be presented to and approved by the City Manager or his designee prior to the placement of the device. Approval or denial must be determined within five business days. A request to place newspaper vending device in the public right-of-way and site plan shall be in the form attached hereto as Exhibit A. The applicant shall have five business days to request an opportunity to object to a denial of permission or failure of the city to either approve or deny a request. The objection shall be heard within five business days of the objection. Such objection shall be heard by the City Manager or his designee.

A site plan is not required for devices in place as of the date of this Amended Regulation.

2. All persons, partnerships or corporations operating newspaper vending devices must provide the City Manager or his designee with a location inventory of such devices located within the public right-of-way. The location inventory must be updated yearly in July. Such inventory need not consist of a listing of locations, depiction on a street plat is acceptable. The initial inventory shall not be required until October 1, 1984. ~~All de~~vices must meet the site plan criteria as out-lined in item #1 above.

3. Placement of the newspaper dispensing device must be such that it is not accessible from that part of the right-of-way normally reserved for vehicular traffic and does not obstruct normal pedestrian traffic, interfere with handicap access, create driver sight distance problems or otherwise create a public nuisance nor shall the method of attachment allow the device to be moved after placement to create these problems.

4. Each newspaper vending device shall be maintained and kept in good repair at all times. The owner/operator of newspaper dispensing devices within the public right-of-way shall have on file with the City Manager or his designee proof of current comprehensive liability insurance covering the newspaper dispensing devices they own. Compliance with this provision shall occur on or before July 17, 1984.

5. No advertising media shall appear on newspaper dispensing devices located within the public right-of-way except for the name and price of the publication, and promotion of the publication itself or written articles contained therein.

6. The owner/operator of newspaper dispensing devices within the public right-of-way must register a responsible contact person, a representative who can be reached during usual business hours, with the City Manager or his designee. This contact person shall be

able to respond in a reasonable time to problems relative to the enforcement of these rules and regulations.

7. If, upon written notification or such other method of notification consistent with an emergency or critical situation, the owner/operator of a newspaper dispensing device fails to remedy violations of these rules and regulations and/or relevant sections of the Cincinnati Municipal Code, the offending dispensing device shall be removed from the right-of-way and the owner/operator shall be billed for the cost of the removal and storage of the device. In all non-emergency situations, the owner/operator shall have five business days to request an opportunity to object to the order to remedy violations. The objection of the owner/operator shall be heard within five business days of the request. Such objection shall be heard by the City Manager or his designee.

Approved:

/s/ Sylvester Murray
Sylvester Murray

Dated: June 1, 1984